

Committee Opinion
September 8, 1995

LEGAL ETHICS OPINION 1643

DUTY TO REVEAL FORMER CLIENT'S
MISREPRESENTATION ON
BANKRUPTCY PETITION WHEN
ATTORNEY GAINED KNOWLEDGE OF
UNLISTED ASSETS THROUGH PRIOR
REPRESENTATION.

Client, who was represented by attorney in divorce, files bankruptcy and lists attorney's fees but not property received in divorce settlement. Should attorney reveal information about the property.

You have asked the committee to consider the following hypothetical:

An attorney represented a client in a divorce. Subsequently, the client files for bankruptcy and lists the attorney's unpaid fees as an obligation. The client, however, does not list certain assets that the client owns which are listed in the property settlement agreement that was incorporated into the final decree of divorce. Because it was so incorporated, the property settlement agreement is a part of the public record.

You have asked the committee to opine whether it would be improper for the attorney to reveal, to the bankruptcy court, the information in the property settlement agreement regarding those assets not listed by the former client in his bankruptcy petition.

The appropriate and controlling Disciplinary Rules are DR:4-101(A), DR: 4-101(B)(1), (2) and (3). The committee also refers you to LE Op. 1378 which is essentially the same fact pattern as the one you have presented. The committee is taking this opportunity to reconsider the conclusions reached in LE Op. 1378. To the extent that this opinion is inconsistent with LE Op. 1378, it is overruled.

The committee opined in LE Op. 1378 that a property settlement agreement is not created by the parties with any expectation of confidentiality and so it is not a secret under DR:4-101. However, the committee opined in LE Op. 1147, LE Op. 1347, LE Op. 1349, LE Op. 1367, LE Op. 1407 and LE Op. 1609 that a secret under DR:4-101 can nonetheless be information that is either public or known to third parties if it is information "gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." [DR:4-101(A)]

In LE Op. 1147 the committee opined that once information becomes a matter of public record it is no longer confidential unless it is still a secret under DR:4-101. In LE Op. 1347, the committee reiterated its position that even information which is public or known by third parties may be a secret under DR:4-101 if the attorney knows that disclosure would be either embarrassing or detrimental to the client. In LE Op. 1307 and LE Op. 1367, the committee opined that the duties imposed on an attorney by DR:4-101 survive the termination of the attorney-client relationship, even the client's death. (See LE Op. 1207 and EC:4-6.)

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Therefore, the committee believes that under the circumstances of your hypothetical, where the attorney knows the contents of the property settlement agreement as a result of the prior attorney-client relationship, the attorney must carefully examine the information contained in the settlement agreement and determine whether it is still a "secret" under DR:4-101. The committee believes that if the revelation of the information would be either embarrassing or detrimental to the attorney's former client then the information must be a secret under DR:4-101 which the attorney has a duty to keep confidential. This duty exists despite the fact that others share the same information or the information is a matter of public record.

Under the facts presented, a question is also raised as to whether the attorney may or is obligated to reveal the information contained in the former client's settlement agreement in order to prevent his former client from perpetrating a fraud on the bankruptcy court; or, to support the attorney's claim, as a creditor, in the former client's bankruptcy.

The controlling disciplinary rules are: DR:4-101(D)(2) which requires an attorney to reveal information which clearly establishes that his client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal; and DR:4-101(C)(4) under which an attorney may reveal confidences and secrets necessary to establish the reasonableness of his fees.

With regard to the attorney's obligation under DR:4-101(D)(2) to report client fraud on a tribunal, the committee has previously opined that the fraud must have occurred during the course of the attorney-client relationship. LE Op. 693. In your hypothetical situation, the attorney was no longer representing the client when the bankruptcy petition was filed. Thus, the alleged fraud did not occur "in the course of the relationship" as required by DR:4-101(D)(2). In addition, the alleged fraud is not related to the subject matter of the representation undertaken by the divorce attorney as required by DR:4-101(1)(2). Therefore, the committee is of the opinion that the attorney is not permitted under DR:4-101(D)(2) to reveal any information with respect to his former client's fraud on the bankruptcy court.

Under DR:4-101(C)(4) an attorney may reveal confidences and secrets to establish the reasonableness of his fees. While the former client listed as a debt the fees owed to the former attorney in his bankruptcy filing, it does not follow that the fees are disputed by the client. Therefore, if the fees listed by the former client are not disputed, DR:4-101(C)(4) does not apply. Under those circumstances, the attorney may not reveal to the bankruptcy court the existence of assets which his former client has failed to disclose. Such a revelation would exceed the scope of permissive disclosure authorized or contemplated under DR:4-101(C)(4).

The protection of client confidences and secrets is so fundamental to the attorney-client relationship that any exceptions to this bedrock principle must be strictly limited.